



November 20, 2002

Mr. Jonathan Needle
General Counsel
Houston Firefighters' Relief and Retirement Fund
4225 Interwood North Parkway
Houston, Texas 77032-3866

OR2002-6648

Dear Mr. Needle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172436.

The Houston Firefighters' Relief and Retirement Fund (the "fund") received a request for seven partnership agreements in which the fund is an investor. The fund does not itself assert that the requested information is excepted from disclosure. The fund believes, however, that this request implicates the interests of the partnerships to which the requested information pertains. The fund notified the seven partnerships of this request and of their right to submit arguments to this office as to why the requested information should not be released.¹ The fund also submitted the requested information.² Arguments were submitted to this office by or on behalf of Blackstone Capital Partners IV L.P. ("Blackstone"), Collier International Partners IV, L.P. ("Collier"), Hicks, Muse, Tate & Furst, Inc. ("HMTF"), Lone Star Partners III, L.P. ("Lone Star III"), Lone Star Partners IV, L.P. ("Lone Star IV"), and TCW (SHOP IV), LLC ("TCW"). We also received comments from the requestor.³ We have considered all of the submitted arguments and have reviewed the submitted information.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

²The fund informs us that the requestor has clarified that he seeks access to the partnership provisions of the main bodies of the partnership agreements, but not attachments, schedules, exhibits, and affiliated agreements.

³See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have received no correspondence from the seventh partnership listed by the requestor, Lexington Capital Partners Fund V. Thus, Lexington Capital Partners Fund V has not demonstrated that any information contained in the Lexington Capital Partners V partnership agreement constitutes proprietary information under section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). Therefore, the fund must release the requested information that relates to Lexington Capital Partners Fund V.

Next, we note that Lone Star III and Lone Star IV raise section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects the interests of governmental bodies, not the proprietary interests of private entities such as Lone Star III and Lone Star IV. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). As the fund has not claimed an exception to disclosure under section 552.104, none of the information contained in the Lone Star Fund III or Lone Star Fund IV partnership agreements may be withheld under that exception.

Lone Star III, Lone Star IV, Blackstone, and TCW also assert their expectations of confidentiality with regard to the Lone Star Fund III, Lone Star Fund IV, Blackstone Capital Partners IV, and TCW Shared Opportunity Fund IV partnership agreements. We note, however, that a governmental body may not withhold information that is subject to chapter 552 of the Government Code on the basis of a promise to keep information confidential unless the governmental body has specific statutory authority to make such a promise. *See* Open Records Decision Nos. 514 at 1 (1988), 479 at 1-2 (1987), 444 at 6 (1986). Neither any of the third parties nor the fund informs us that the fund has such statutory authority. Furthermore, information may not be withheld from the public under chapter 552 merely because the person that provided the information to the governmental body anticipated or requested confidentiality in doing so. *See Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Thus, information contained in the Lone Star III, Lone Star IV, Blackstone, and TCW agreements may not be withheld from disclosure on the basis of an agreement to do so or because a partnership anticipated or requested confidentiality in providing information to the fund.

Next, we address the other claims of the private parties that submitted arguments. All six parties that did so raise section 552.110 of the Government Code. This exception protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by

statute or judicial decision,” and (2) “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” See Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁴ See Open Records Decision No. 552 at 5 (1990).

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Blackstone claims that the Blackstone Capital Partners IV partnership agreement is excepted from disclosure in its entirety under section 552.110(b). Blackstone states that the agreement embodies 15 years of experience in private equity investment and, if released, would reveal confidential investment terms and proprietary techniques that a competitor could exploit to Blackstone's disadvantage. Based on Blackstone's arguments and our review of the Blackstone Capital Partners IV agreement, we conclude that Blackstone has demonstrated that the entire agreement is excepted from disclosure under section 552.110(b).

Coller claims that the Coller International Partners IV partnership agreement constitutes a trade secret under section 552.110(a). Coller also asserts that the agreement is excepted from disclosure under section 552.110(b). Coller states that virtually everything about the structure, management, compensation, and operations of an investment fund can be gleaned from the agreement, such that its release would enable competitors to copy Coller's investment model and benefit from Coller's efforts and expense in developing, researching, and negotiating the agreement. Based on Coller's arguments and our review of the Coller International Partners IV partnership agreement, we conclude that Coller has demonstrated that the entire agreement is excepted from disclosure under section 552.110(b). Accordingly, we need not consider whether the agreement qualifies as a trade secret under section 552.110(a).

HMTF claims that the Hicks, Muse, Tate & Furst Equity Fund V partnership agreement is a trade secret under section 552.110(a). HMTF also claims that the agreement is excepted from disclosure under section 552.110(b). HMTF states that the agreement has evolved over a 13-year period of negotiations with investors and contains proprietary information that competitors could use against HMTF in developing comparable provisions for their agreements and in marketing their own partnership agreements against HMTF. Based on HMTF's arguments and our review of the Hicks, Muse, Tate & Furst Equity Fund V partnership agreement, we conclude that HMTF has demonstrated that the entire agreement is excepted from disclosure under section 552.110(b). Accordingly, we need not consider HMTF's claims under sections 552.110(a) and 552.101.

Lone Star III claims that the Lone Star Fund III (U.S.) partnership agreement is a trade secret under section 552.110(a) and also is excepted from disclosure under section 552.110(b). Lone Star IV asserts the same claims with regard to the Lone Star Fund IV (U.S.) partnership agreement. Therefore, we will consider the claims of Lone Star III and Lone Star IV

together.⁵ Having considered the arguments and supporting affidavits of Lone Star III and Lone Star IV and reviewed their respective partnership agreements, we find that Lone Star III and Lone Star IV have made *prima facie* demonstrations that the Lone Star Fund III and Lone Star Fund IV partnership agreements constitute trade secrets under section 552.110(a). We have received no arguments that rebut these claims as a matter of law. Therefore, we conclude that the Lone Star Fund III and Lone Star Fund IV agreements are excepted from disclosure in their entireties under section 552.110(a). Having made this determination, we need not also address the claims of Lone Star III and Lone Star IV under sections 552.110(b) and 552.101.

Lastly, we consider TCW's arguments with regard to the TCW Shared Opportunity Fund IV partnership agreement. Under section 552.110(b), TCW asserts that its competitors could use information relating to management fees, the general partner's carried interest, and the partnership's investment restrictions, goals, anticipated returns, and strategy to TCW's disadvantage in attracting investors. Based on TCW's arguments and our review of the TCW Shared Opportunity Fund IV partnership agreement, we conclude that TCW has demonstrated that portions of the agreement are excepted from disclosure under section 552.110(b). We have marked the information relating to TCW that must be withheld.

In summary, the Blackstone Capital Partners IV, Collier International Partners IV, and Hicks, Muse, Tate & Furst Equity Fund V agreements are excepted from disclosure in their entireties under section 552.110(b). The Lone Star Fund III and Lone Star Fund IV agreements are excepted from disclosure in their entireties under section 552.110(a). The marked portions of the TCW Shared Opportunity Fund IV agreement are excepted from disclosure under section 552.110(b). The remaining portions of that agreement and the entire Lexington Capital Partners Fund V agreement are not excepted from disclosure and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

⁵We note that Lone Star III has submitted, as information that it believes to be responsive to the request for information, the Fifth and Sixth Amendments to the First Amended and Restated Limited Partnership Agreement of Lone Star Fund III (U.S.), L.P. Likewise, Lone Star IV has submitted, as information that it believes to be responsive, the Fourth Amendment to the First Amended and Restated Limited Partnership Agreement of Lone Star Fund IV (U.S.), L.P. The fund, however, did not submit these three amendments in requesting this decision. This decision addresses only the information relating to Lone Star III and Lone Star IV that the fund submitted to this office. See Gov't Code § 552.301(e)(1)(D).

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

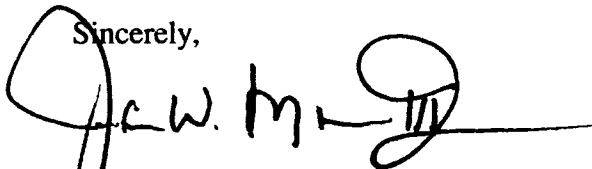
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a large, stylized initial "J" and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 172436

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